IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 569 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SALIMBHAI MUNIRBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 569 of 1997
   MR NB TIWARI for the appellant
   MR HH PATEL, ld.APP for Respondent

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 14/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellant who is convicted for the offence punishable under Section 376 of IPC in Sessions Case No.201 of 1995 by the learned Addl. Sessions Judge, Ahmedabad (Rural), Mirzapur, at Ahmedabad, has challenged the said judgment in this appeal. The learned trial Judge by convicting the appellant for the offence under Section 376 of IPC has awarded sentence to suffer rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in defult to undergo simple imprisonment for one year.

2. The incident in question has taken place any time between 20.30 hrs. to 24.00 hrs. on 19th June 1995 in Gyaspur area of the City of Ahmedabad, when the appellant committed rape on his step-daughter, namely, Kamrunisha, aged about 10 years, against her will. As per the prosecution case, the complainant Hamidaben is the wife of the appellant. The first marriage of Hamida had taken place with one Kadarbhai. Because of the said wedlock, Hamida had two children, one daughter Yasminbanu and a son, Nasir. Hamida, after taking divorce from Kadarbhai, again married to one Jaleel with whom she lived for three years. The daughter of the complainant Kamrunisha was born out of the wedlock with Jaleel. Hamida again took divorce from Jaleel and thereafter married to the present appellant Salimbhai and was staying with him in the hut situated near Hariyali Society since two years with two minor children, son and daughter Kamrunisha. According to Hamida, her elder daughter, Yasminbanu was married and she used to visit the complainant often.

It is further the prosecution case that on 19.6.1995, at about 8.00 p.m., the appellant, the complainant and Kamrunisha were there in the house. The appellant had, after taking meals, gone out to purchase bidis and had also taken the prosecutrix Kamrunisha with him. As they did not return till 9.00 p.m., the complainant, her son and son of a neighbour had gone out in search of them. The search did not yield any result. When they returned back at about 12.00 midnight, the appellant and the prosecutrix had come home. The appellant stood outside the house and the prosecutrix was sent inside the house. On inquiring about the Salvar by the complainant, the prosecutrix informed that her father had removed it and thrown it in the bush. On being further inquired, the prosecutrix informed that papa (appellant) had taken her to the bush near the Canal and removed her Salvar, made her lie down, and climbed upon her, after removing his trousers, and penetrated his

penis into her Vagina. When she cried, she was slapped. The complainant found that the prosecutrix was bleeding profusely. On hearing this fact, the complainant scolded the appellant and thereafter, he ran away from the house. The complainant filed the complaint before the Aslali Police Station on 21st June 1995. The complainant has given explanation for the delay in filing the complaint by stating that, initially, she decided to forgive the appellant and with a view to see to it that no outsiders know that the offence has been committed by her own husband. However, later on, she thought that if the appellant was allowed to go free, he would commit the same act again. The prosecutrix was thereafter sent to the Civil Hospital, Ahmedabad where she remained as an indoor patient for three days.

Rakeshkumar Sharma, PW14-Exh.4, PSI of Aslali Police Station carried out the necessary investigation on the basis of the complaint at Exh.9 recorded by the PSO, Bachubhai Barot. The appellant was arrested on 22nd June 1995 in the evening hours under Panchnama Exh.18.

After collecting necessary material, the chargesheet was filed against the appellant.

3. The learned trial Judge framed the charge at Exh.3 against the appellant. The appellant denied the same and claimed to be tried. The appellant in his further statement recorded under Section 313 of the Code of Criminal Procedure, denied his involvement in the commission of the offence. In his written reply he admitted the relationship of the prosecutrix with the appellant is of step-daughter and it is stated that the real father of the prosecutrix is one Sharif Noormohamad Shaikh. The appellant has denied his involvement in commission of the offence. According to him, he was detained by the police for two days and two nights when he had gone to lodge the complaint against Hamida and her son-in-law. According to him, quarrel used to take place between him and the complainant. As and when the complainant used to visit him in the jail, she was demanding money from him. In short, he has stated that he has been falsely involved in the offence. The appellant has also examined two defence witnesses, namely, Lalji Meghji Rathod, DW1-Exh.46, Jailor, Central Jail, Sabarmati, Ahmedabad, and Kanaksinh Manabhai Khant, DW2-Exh.47, Police Constable at Vejalpur Police Station. The learned trial Judge after appreciating the oral and documentary evidence on record, accepted the prosecution case and passed the judgment and order of conviction and sentence against the appellant, as stated earlier.

4. At the outset, we may mention that Mr.N.B.Tiwari, learned Counsel has filed this appeal on behalf of the appellant. He has stated before us that he is now no more appearing in the matter and therefore, he should be allowed to withdraw from the matter. We have turned down his request on the ground that he has not informed the appellant about his withdrawal from the matter by sending intimation by Registered Post Ack. Due. Therefore, we have adjourned this matter for two days and it is taken up today. Suffice it to say that Mr.Tiwari has thereafter not appeared in the matter. However, learned APP Mr.H.H.Patel has taken us through the entire evidence on record including the judgment of the trial Court. We have also gone through the grounds stated in the memo of the appeal.

5. We have narrated the entire prosecution case from the evidence of the complainant Hamida, PW1-Exh.8 and therefore, it is not necessary for us to again narrate the same. Nothing material has been brought out by the defence in the cross-examination. The complainant has been crossexamined on the question about her earlier marriages, the divorces, residence and her picking up quarrels with the appellant. She has specifically denied the suggestion that the appellant was not residing with her at the time of the incident and that she was demanding divorce from him. She has shown ignorence about the fact that the appellant was detained in the polic lock up of Vejalpur Police Station two days prior to the filing of the complaint. She has also denied the suggestion that she is staying with one person namely, Jaleel and has filed false complaint with a view to get divorce from the appellant. She has admitted that she has not stated about the fact that the prosecutrix informed her about the appellant who climbed on her after removing his trousers. She has also admitted that she has not stated about the fact that she inquired from the prosecutrix regarding oozing out of blood from her vagina. Finally, the contradictions have been brought out with regard to her role in not mentioning the fact of the prosecutrix profusely bleeding and the complainant had cleaned the same.

After going through her evidence on record, we find that the complainant has stated the entire facts in most natural way without any exaggeration. The so-called contradictions and improvement in her statements would never make her version unbelievable. We are not prepared to believe that she has filed the false case making allegations against her own husband involving her own

daughter. In any case, we find that her evidence is trust worthy.

Apart from the evidence of the complainant, the prosecution has placed reliance on the evidence of the prosecutrix Kamrunisha. She is examined as PW3-Exh.13 in the present case. Her age is shown to be 12 years and before trial Court before giving oath, asked her questions and on being satisfied with the reply, examined her as a witness. She in her evidence has specifically involved the appellant who has committed rape on her which totally corroborates the version given by the complainant, i.e., the appellant having taken her out of the house for the purpose of purchasing bidi and thereafter taking her to the canal area. She has given all minute details about the illegal act committed by the appellant. She had shown the place of incident to the police and also the trousers lying there. The prosecutrix has been crossexamined at length. On going through the same, it can safely be concluded that she has stood the test of crossexamination successfully. She has been cross examined about her own father, Jaleel and was also suggested that she was staying with him, to which the prosecutrix has specifically denied. While denying the suggestion that her mother was still maintaining relationship with Jaleel, she also denied the same. She has maintained that they were staying with the appellant only. True, there is some inconsistency in her evidence as well as the evidence of the complainant about the presence of her brother Nasir when she had accompanied the appellant. She has stated about the presence of Nasir in the house while her mother Hamida has denied the same. We feel that no importance can be given to such discrepancy. On questions put to her about the wall of the house was nearer to the scene of offence and how both of them crossed the wall, are required to be discarded. She has specifically stated in her cross-examination that she was made to lie down on the sandy land. Regarding the actual act having committed by the appellant, the defence has not left out anything and has made all attempts by asking relevant and irrelevant and all sorts of questions. The Court has also permitted it. It is not necessary for us to appreciate each and every question being asked. While appreciating the evidence of the prosecutrix in the instant case, we have to bear in mind the fact that she is a victim of the incident and that she deposes against her own father and that at the time of incident, she was aged only 10 years and that she is giving the evidence two years after. Even though time has elapsed from the date of incident, she has still not come out of the shock and torture experienced by her.

While appreciating the evidence of the prosecutrix keeping in mind the aforesaid circumstances, we have no hesitation in holding that she has given consistent version in her evidence on all material aspects about the act of rape being committed by the appellant on her. In fact, there are no material contradictions in her earlier version recorded in the Police statement, even though her evidence is duly corroborated by complainant, even without any corroboration, the version of the prosecutrix Kamrunisha is to be accepted in toto. The Supreme Court in the case of Bharwad Bhoginbhai Harjibhai v. the State of Gujarat, reported in AIR 1983 S.C. 753 has ruled that there need not be any corroboration to the version of the prosecutrix. However, as noted in the present case, the earlier version of Kamrunisha that she was raped by the appellant is amply corroborated by other reliable evidence on record.

The evidence of the prosecutrix further gets support from the evidence of Dr.Bharat Dave, PW9-Exh.26 who examined the victim immediately after the incident. Dr.Dave, at the relevant time, was serving as Medical Officer at Casualty Ward of the Civil Hospital. According to his evidence, the prosecutrix was brought with Police Yadi at about 2.45 p.m. on 22.6.1995. He had examined her. As per the say of the mother of the prosecutrix, he has recorded the case of rape as the history in the medical case papers. He has noticed the following injuries/signs on the prosecutrix:

(1) An abrasion over the chin of size 1/5 cm. x 1 cm browinish - black colour.

(2) An abrasion over the Lt. nostril of size 1 cm linear brownish - black colour.

(3) Multiple linear brownish black colour scratches over Rt. knee & Lt.thigh.

(4) Greenish blue bruise of size 4 cms x 4 cms. over Lt.arm.

(5) Laceration over fonchette of size 0.5 cm at 6 o'Clock position.

(6) A linear scratch over Rt. side chest.

(7) Breast & external genitals not developed.

(8) Pubic & Audillary hairs not developed.

(9) Underclothes soiled with blood.

(10) Laceration abotu 1 cm on Lt. labia minora.

(11) Hymen intact.

(12) No sperms found in vaginal smear.

(13) No gonococci isolated in urethral swab.

(14) Samples of blood, saliva taken, sealed & handed over to WPCB No.89.

He has opined that the prosecutrix was below the age of 13 years. Considering the injuries sustained by her in the private parts, he has opined that, the penis must have been inserted in the vagina. He has also opined that the injuries sustained by the prosecutrix were 72 hours prior to the examination.

The prosecutrix was also examined by Dr.Gunvantbhai Kantilal, PW12-Exh.34, who at the relevant time, was serving as Tutor of Gynaec Department of the Civil Hospital, Ahmedabad. He has examined the prosecutrix at about 4.30 p.m. on 22.6.1995. As per his say, the prosecutrix herself has given the case history wherein she has given all the details about the incident having taken place on the night of 19.6.1995, when the appellant took the prosecutrix out of the house for the purpose of purchasing bidi and thereafter committed rape on her. Dr.Gunvantbhai has mentioned about the injuries and other facts recorded by Dr.Dave. Thus, from the evidence of Dr.Dave as well as Dr.Gunvantbhai, it not only relates to but also corroborates the version of the prosecutrix implicating the appellant with regard to commission of the offence at the earliest point of time. We, therefore, hold that the prosecution has, in no manner of doubt, proved the charge levelled against the appellant. We accordingly hold the appellant guilty for committing the offence under Section 376 of IPC.

6. From the record it appears that the appellant has taken the plea of alibi by contending that on the day of the incident, i.e. 19.6.1995, he was in police custody and therefore, he has been falsely involved in the commission of the offence. In order to make good his case, he has examined the defence witnesses Lalji Rathod, DW1-Exh.46, Jailor of Central Jail, Sabarmati, Ahmedabad and Kanaksinh, DW2-Exh.47, Police Constable of Vejalpur

Police Station. Police Constable Kanaksinh was present with necessary lock-up register as well as arrest register. From the evidence of Kanaksinh, it appears that no question is put to him as to whether the appellant was in lock-up at Vejalpur Police Station on 19.6.1995. Not only that the appellant himself has not stated as to for which offence he was arrested and was in custody of the police. In absence of any details about the detention of the appellant by the Vejalpur Police Station and was kept in police custody, it is not possible to accept the defence version put forward by the appellant. On the other hand, from the evidence of the complainant Hamida as well as the prosecutrix, it is clear that the appellant was very much present at the house on the night of 19.6.1995. From the evidence of DW1 Lalji Rathod, Jailor of Central Jail, Sabarmati, it is clear that the complainant has met the appellant in the jail on 7.7.1995, 26.7.1995, 7.9.1995 and 9.10.1995. The entry to the said effect is made in the register maintained by the jail authorities. The purpose of visiting the jail on 20.12.1995 is stated to be household work. From the evidence of DW1 Lalji Rathod, it is clear that the appellant remained in jail as an undertrial prisoner when he was visited by complainant Hamida. Reading his evidence, it does not transpire as to whether the complainant has demanded money from him. We are, therefore, of the view that the evidence of DW1 Lalji Rathod is of no assistance to the appellant.

7. Thus, considering the entire evidence on record, we are convinced beyond any manner of doubt about the involvement of the appellant in commission of the heinous crime. Manoj Bhavsar, PW13-Exh.37, Clerk of the Municipal Corporation has produced the abstracts of the birth certificate of the prosecutrix at Exh.38 and the original birth certificate at Exh.39 wherefrom it is clear that the prosecutrix was born on 22.10.1985 and the entry to that effect was made on 29.11.1985. Even if there is inconsistency about the name of the father of the prosecutrix in the birth certificate to be of Mohamad Sharif Noormohamad and even if we ignore the said certificate, considering the evidence of the complainant wherein she has given the details about her previous marriages and the children born during the time, we see no difficulty in accepting the evidence of the prosecutrix wherein she has stated her age to be 12 years, as was recorded by the learned Judge. Apart from that, in view of the medical evidence on record where her physical condition is described as undeveloped child, there cannot be any manner of doubt that the prosecutrix was minor below the age of 13 or 14 years. Under the

circumstances, the appellant being the father of the victim girl, does not deserve any leniency as far as the sentence part is concerned. In our opinion, the learned trial Judge was perfectly justified in awarding the sentence of rigorous imprisonment of ten years under Section 376 of IPC and imposing fine of Rs.5,000/-, in default to under simple imprisonment for one year. We, therefore, see no merits in this appeal. The appeal is hereby dismissed.

(Kshitij R. Vyas, J.)

(Ravi R. Tripathi, J.)

Sreeram.